No. 94209-9

IN THE
SUPREME COURT OF THE STATE OF WASHINGTON

Certified Question
Propounded by The Hon. Justin L. Quackenbush
United States District Judge (E.D. Wash.)

JIN ZHU,

Plaintiff,

vs.

NORTH CENTRAL EDUCATIONAL SERVICE DISTRICT NO. 171,

Defendant.

DEFENDANT'S RESPONSE TO BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON

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A. RCW 49.60.030, THE WLAD'S DECLARATION OF "FREEDOM FROM DISCRIMINATION," INVOLVES DISCRIMINATION AGAINST PERSONS WHO ARE MEMBERS OF SPECIFIC PROTECTED CLASSES.

Amici asserted: "The Legislature also clearly intended these protection to cover prospective, as well as current employees." (Brief of Amici at 3.) If such was "clearly intended" then it would not have been necessary for Judge Quackenbush to certify the issue to this Court. Judge Quackenbush concluded:

> The scope of RCW 49.60.210(1) is not clear. Whether Plaintiff's retaliation claim is encompassed by the statute and within the broad policy statements of WLAD is an open question.

Zhu v. North Central Educ. Servs. Dist., 2016 7428204, *16 (E.D.Wash. 2016).

Amici cited RCW 49.60.030, which is titled "Freedom from discrimination – Declaration of civil rights." RCW 49.60.030(1)(a) provides in part:

> The right to be free from discrimination **because of race, creed, color, national origin, sex, honorably discharged veteran or military service, sexual orientation, or the presence of any sensory, mental, or physical disability** or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. The right shall include, but not be limited to:
>
> (a) **The right to obtain and hold employment without discrimination . . . .**

(Emphasis added.) The statute's use of the term "the right to obtain . . . employment" refers to persons in the various protected classes (i.e., race, creed, color, etc.).[1] The term "right to obtain . . . employment" does not include a person seeking employment who is not a member of one of the specified protected classes.

The WLAD provides a disparate treatment claim when a prospective employee is not hired because of his or her membership in a protected class such as race, creed, color, etc. However, this does not suggest that a prospective employee has a cause of action for retaliation for refusal to hire under the facts of this case.

Amici admitted that RCW 49.60.030 "addresses discrimination in the first instance rather than retaliation . . . ." (Brief of Amici at 4.)

There is a specific statute in the WLAD dealing with refusal to hire. RCW 49.60.180 provides: "It is an unfair practice for any employer: (1) To **refuse to hire** any person because of age, sex, marital status, sexual orientation, race, creed, color, national origin" or other specified protected classes. (Emphasis added.) RCW 49.60.210(1) does not state that there is a retaliation cause of action for refusal to hire because the job applicant engaged in statutorily protected activity in the past with another employer.

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[1] The jury found that the District did not discriminate against Mr. Zhu due to his race or national origin.

Statutes involving the refusal to hire -- Other specific statutes addressing a refusal to hire are RCW 74.20A.230 ("No employer shall discharge or discipline an employee or **refuse to hire** a person for reason that an assignment of earnings has been presented"), RCW 26.23.080 ("No employer shall discipline or discharge an employee or **refuse to hire** a person by reason of an action authorized under this chapter."), RCW 9.94.7604(8) ("No employer may discipline or discharge an employee or **refuse to hire** a person by reason of an action authorized under this chapter."), RCW 38.40.110 ("No . . . employer . . . shall by any constitution, rule, bylaws, resolutions, vote or regulation, or otherwise, discriminate against or **refuse to hire**, employ, or reemploy any member of the organized militia of Washington because of his or her membership in said organized militia."), RCW 26.18.110(8) ("No employer may discharge, discipline, or **refuse to hire** an employee because of the entry or service of a wage assignment"), RCW 49.60.172 (2) ("No person may discharge or fail or **refuse to hire** any individual, or segregate or classify any individual" due to HIV status), RCW 9.94A.7705 (7) ("No employer may discharge, discipline, or **refuse to hire** an employee because of the entry or service of a wage assignment order"), RCW 49.44.090 ("It shall be an unfair practice: (1) For an employer . . . because of an individual is forty years of age or older, to **refuse to hire** or employ or license or to bar

or to terminate from employment such individual"). (Emphasis added.) **The Legislature knows how to write a statute involving a refusal to hire.** Here, RCW 49.60.210(1) does include anything about a refusal to hire or anything about making a prospective employer liable based upon a prospective employee's involvement in protected activity during her or his past employment.

Amici cited this Court's recent opinion of *State v. Arlene's Flowers, Inc.*, 187 Wn.2d 804, 389 P.3d 543 (2017). The anti-retaliation statute was not involved in *Arlene's Flowers.* Amici stated at 4:

> Reading the WLAD to protect job applicants from discrimination, but not from retaliation for previously opposing discrimination, **would be logically incoherent** and would not comport with either the text of the WLAD or its interpretation to date by the Washington courts.

(Emphasis added.) RCW 49.60.180 creates a cause of action (a disparate treatment claim) for refusal to hire if the refusal to hire is based upon a plaintiff being a member of a protected class. RCW 49.60.210(1) does not require membership in a protected class. Such is not "logically incoherent" as asserted by Amici.

Arlene's Flowers was a public accommodations discrimination case under RCW 49.60.215(1)(b). *Arlene's Flowers* involved discrimination on the basis of a specific protected class: sexual orientation.

Discrimination on the basis of sexual orientation is specifically made an unfair practice by the WLAD because sexual orientation is a protected class pursuant to both RCW 49.60.030 and RCW 49.60.180. **An applicant for employment is not recognized as a protected class under the WLAD.**

RCW 49.60.210(1) does not use the terms "job applicant" or "applicant for employment." To apply the anti-retaliation statute to the facts of this case, the legislative history to the 1985 amendments should demonstrate the Legislature's intention to create a new retaliation cause of action in favor of job applicants. **There is nothing in the legislative history to demonstrate that the Legislature had such an intention.** "When faced with a question of statutory interpretation, we must not add words where the legislature has chosen not to include them." *Arlene's Flowers,* 187 Wn.2d at 829. (Punctuation omitted.)

> RCW 49.60.210(1) does not specifically provide protection for job applicants, unlike RCW 40.60.030(1) *[sic]* which states the right to be free from discrimination includes "[t]he right to <u>obtain</u> and hold employment with[out] discrimination." RCW 49.60.030(1)(a) (emphasis added). . . . **The fact the Washington Legislature explicitly extended protection to job applicants and prospective employment on no less than six occasions within WLAD could suggest that by its silence the Legislature did not intend for job applicants to receive protection under RCW 49.60.210(1).**

Zhu v. North Central Educ. Serv. Dist., 2016 WL 7428204, *10 (E.D.Wash. 2016). (Emphasis added.)

Amici argued that "prospective employees deserve the same rights as others . . . ." (Brief of Amici at 5.) This argument should be addressed by the Legislature and not by this Court. If a legislative body chooses to do so, it knows how to write a statute to protect prospective employees from retaliation. *See, e.g.,* 42 U.S.C. § 2000e-3(a) (anti-retaliation statute providing protection for "applicants for employment" who have engaged in protected activity).

A broad interpretation of RCW 49.60.210(1) "does not *per se* resolve the issue of the scope of" the statute. *Zhu, supra* at *7.

Amici repeatedly cited to *Marquis v. City of Spokane,* 130 Wn.2d 97, 922 P.2d 43 (1996). (Brief of Amici at 2-4, 7.) *Marquis* did not involve a claim for retaliation under RCW 49.60.210.[2] *Marquis* was a disparate treatment lawsuit based on sex discrimination. This Court stated at 101:

> We hold that under the broad protections of RCW 49.60.030, an independent contractor may bring an action for discrimination in the making or performance of a contract for personal services **where the alleged discrimination is based on sex, race, creed, color, national origin or disability.**

[2] This Court noted that plaintiff brought five separate claims including a claim for retaliation. The Court stated: "Only the claims relating to sex discrimination are involved in this appeal." 130 Wn.2d at 103 n. 1.

(Emphasis added.)

RCW 49.60.210(1) provides: "It is an unfair practice for **any employer"** to retaliate due to protected activity. (Emphasis added.) 49.60.180 provides: "It is an unfair practice for **any employer** . . . [t]o refuse to hire any person" due to her or his membership in a protected class. (Emphasis added.) The District was never Mr. Zhu's employer.

Under RCW 49.60.210(1) **a plaintiff can maintain a retaliation claim based on protected activity only against her or his employer or an entity that is the functional equivalent of plaintiff's employer.** *Malo v. Alaska Trawl Fisheries, Inc.,* 92 Wn.App. 927, 930-31, 965 P.2d 1124 (1998) (RCW 49.60.210(1) "read as a whole, is directed at entities functionally similar to employers"), *rev. denied* 137 Wn.2d 1029, 980 P2d 1284 (1999); *Woods v. Washington,* 2011 WL 31852, *4 (W.D.Wash. 2011) (applying Washington law; quoting *Malo* that the anti-retaliation statute "is directed at entities functionally similar to employers"), *aff'd* 2012 WL 1111470 (9th Cir. 2012). *See also Galbraith v. TAPCO Credit Union,* 88 Wn.App. 939, 949-50, 946 P.2d 1242 (1997) (an independent contractor is entitled to bring a retaliation claim despite the absence of a true employment relationship), *rev. denied* 135 Wn.2d 1006, 959 P.2d 125

(1998). Here, the District was not Mr. Zhu's employer or the functional equivalent of Mr. Zhu's employer.

B. THE WLAD SERVES ITS INTENDED PURPOSE WITHOUT INTERPRETING RCW 49.60.210(1) AS CREATING A RETALIATION CAUSE OF ACTION IN FAVOR OF A PROSPECTIVE EMPLOYEE AGAINST A PROSPECTIVE EMPLOYER.

Amici set forth a partial quote from *Allison v. Housing Auth. of City of Seattle,* 118 Wn.2d 79, 821 P.2d 34 (1991) (claim for age discrimination and retaliation and adopting the "substantial factor" test for causation). (Brief of Amici at 5.) The full quote at 94 of *Allison* is as follows:

> As noted above, a "but for' standard of causation will also have a detrimental effect on enforcement of antidiscrimination laws. People will be less likely to oppose discrimination by bringing claims or testifying if this court does not provide them some measure of protection against retaliation.

This Court's discussion was made in the context of an employee engaging in protected activity with her own employer: the filing of an age discrimination claim. There was no suggestion by this Court that an employee who is discriminated against by her own employer will be reluctant to oppose the discrimination because of a fear that such will negatively affect her in the future if she applies for employment with a different employer.

Amici stated: "Although this Court has not yet addressed the exact circumstances of this case, it has held that independent contractors, not just employees, may sue for discrimination under the WLAD." (Brief of Amici at 7.) However, in those cases, the plaintiffs suing for retaliation were the functional equivalent of an employee or the defendant was the functional equivalent of plaintiff's employer.

Amici cited *Sambasivan v. Kadlec Med. Center,* 184 Wn.App. 567, 338 P.3d 860 (2014) and *Currier v. Northland Services, Inc.,* 182 Wn.App. 733, 332 P.3d 1006 (2014), *rev. denied* 182 Wn.2d 1006, 342 P.3d 326 (2015). (Brief of Amici at 7.) **In neither of these cases did the protected activity and retaliation occur from different actors.**

- In *Sambasivan* (allowing a retaliation claim brought by an independent contractor), plaintiff was an interventional cardiologist of Indian descent who was an independent contractor of the hospital. *Id.* at 571, 592. The physician sued the hospital for national origin discrimination together with five other claims. *Id.* at 572. Plaintiff alleged that the hospital thereafter retaliated against him by adopting a new proficiency standard which caused him to become ineligible to renew his interventional cardiology privileges. *Id.* at 570, 583. In allowing plaintiff's retaliation claim under RCW 49.60.210(1), the *Sambasivan* court stated: "Kadlec's denial of privileges, which directly affects the

ability of physicians to carry on their profession within the hospital, is sufficiently equivalent, or derivative of a labor-related activity, to be actionable under the statute." *Id.* at 592.

- In *Currier* (allowing a retaliation claim brought by an independent contractor), plaintiff was an independent contractor who worked for defendant corporation as a truck driver. *Id.* at 738. Plaintiff reported abusive, racially discriminatory language of another independent contractor to the defendant corporation. *Id.* Two days later, defendant terminated plaintiff's contract. *Id.* The *Currier* court held that liability existed based on defendant's "own retaliatory conduct against an independent contractor after he complained to" the defendant. *Id.* at 749.

Plaintiff in *Currier* was employed by the defendant and made his discrimination complaint to the defendant. As explained by Judge Quackenbush:

> This contrasts with the instant matter where ESD 171 never employed Plaintiff and was not a party to the discrimination lawsuit against Waterville School District. In *Currier,* there was a preexisting relationship wherein the discrimination and retaliation occurred.

Zhu, supra at *7.

The Court of Appeals interpreted the scope of RCW 49.60.210(1) in *Malo v. Alaska Trawl Fisheries, Inc.,* 92 Wn.App. 927, 965 P.2d 1124 (1998), *rev. denied* 137 Wn.2d 1029, 980 P.2d 1284 (1999). In construing

the anti-retaliation statute, the *Malo* court declined to find that the words "or other person" in the statute included a co-worker as a potential defendant and stated that the statute "is directed at entities functionally similar to employers." *Id.* at 930. Plaintiff was a co-captain of a ship owned by the defendant corporation. *Id.* at 928-29. Plaintiff confronted his co-captain about gender based discrimination toward other crew members. *Id.* at 929. Plaintiff then reported the co-captain's behavior to defendant. *Id.* Later, the defendant non-renewed plaintiff's contract. *Id.* Plaintiff argued that RCW 49.60.210(1) applied because the statute prohibited retaliation by any "person." *Id.* The *Malo* court rejected this argument and found the inclusion of "or other person" in the statute is restricted by the preceding words "employer," "employment agency" and "labor union." *Id.* at 930. Therefore, the *Malo* court held: "RCW 49.60.210(1) does not create personal and individual liability for co-workers." *Id.* at 930-31. The *Malo* court stated that the statute "read as a whole, is directed **to entities functionally similar to employers** who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden under RCW 49.60." *Id.* at 930. (Emphasis added.) The opinion in *Malo* was cited in *Owa v. Fred Meyer Stores,* 2017 WL 897808 (W.D.Wash. 2017), where the district court stated at *2:

> Plaintiff's claims for retaliation, failure to provide reasonable accommodation, and race-based harassment are similar in that they require an employee-employer relationship. *See* RCW 49.60.210 ("[i]t is an unfair practice for any *employer* . . . to retaliate.) (emphasis added); RCW 49.60.180 ("[i]t is an unfair practice for any *employer*[ ] . . ."") (emphasis added); *see also Malo v. Alaska Trawl Fisheries, Inc.*, 92 Wn.App. 927, 965 (1998) (confirming that the term "or other person" is restricted by the words "employer," "employment agency," and "labor union.").

See also Woods v. Washington, 2011 WL 31852 (W.D.Wash. 2011), (quoting *Malo* for the statement that RCW 49.60.210(1) "read as a whole, is directed at entities functionally similar to employers who discriminate by engaging in conduct similar to discharging or expelling a person who has opposed practices forbidden by RCW 49.60"), *aff'd* 2012 WL 1111470 (9th Cir. 2012). Here, the relationship between Mr. Zhu and the District was not the functional equivalent of an employee-employer relationship. Amici made no attempt to distinguish *Malo, Owa* and *Woods*.

Washington's anti-retaliation statute is strong without the creation of a new retaliation cause of action under the facts of this case. There is no indication that the Legislature's intended purpose in amending the WLAD the anti-retaliation statute in 1985 was to create a new cause of action against prospective employers based upon protected activity that an employee took in the past involving a different employer.

Simply because a statute is to be liberally construed does not warrant creating a new cause of action where none previously existed. For example, RCW 51.21.010 specifically provides that the workers' compensation act "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss . . . ." This Court held that a retaliation claim under RCW 51.48.025 did not provide a retaliation cause of action to a former employee who was not rehired because the former employee filed a workers' compensation grievance during the course of previous employment with the employer. *Warnek v. ABB Combustion Eng'g Servs., Inc.,* 137 Wn.2d 450, 455, 972 P.2d 453 (1999). **"There is a distinction between discharge or other discrimination during the course of employment and not being rehired for new employment."** *Id.* at 458. (Emphasis added.)

C. CONCLUSION

The Court should find that in amending the statute at issue in 1985 the Legislature did not intend to create a retaliation cause of action in favor of a job applicant based upon the job applicant's protected activity while working for a previous employer.

RESPECTFULLY SUBMITTED this 21st day of August, 2017.

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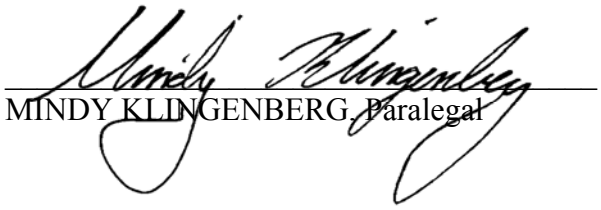

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